87-659

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

JOHN WILLIAM HAMMOND,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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28 pp

QUESTION PRESENTED FOR REVIEW

1. Whether a person who performs an act which is merely helpful to a gambling operation may be properly considered a participant who "conducts, finances, manages, supervises, directs or owns all or part of an illegal gambling operation" under Title 18 United States Code Section 1955 under a fair and reasonable interpretation of a criminal statute.

2. Whether an interpretation of "conduct" which includes merely helpful acts gives sufficient notice of illegal activities such that an individual should reasonably know what acts and associations are prohibited under Section 1955.

PARTIES TO THE PROCEEDING

The parties to the proceedings are as follows:

JOHN WILLIAM HAMMOND,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

TABLE OF CONTENTS

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

TABLE OF AUTHORITIES

OPINIONS BELOW

The opinion of the Eighth Circuit Court of Appeals, whose judgment is sought to be reviewed, is reported at 821 F.2d 473 and is reprinted in Appendix A.

JURISDICTION

The judgment of the Eighth Circuit Court of Appeals was filed on June 16, 1987. Appendix A. A timely petition for rehearing was denied on July 27, 1987. (Appendix B), and this petition was filed within ninety days of that date. This Court's jurisdiction is invoked under Title 28 United States Code Section 2101(d).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The United States Constitution provides:

> Amendment XIV: " . . . nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

Title 18 United States Code Section 1955 provides in pertinent part as follows:

> (a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined not more than $20,000.00 or imprisoned not more than five years, or both.
>
> (b) As used in this section--
>
> (1) "illegal gambling business" means a gambling business which--
>
> (i) is a violation of the law of a State or political subdivision in which it is conducted;
>
> (ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and

(iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000.00 in any single day.

(2) "gambling" includes but is not limited to pool-selling, bookmaking, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy, bolita or numbers games or selling chances therein.

(3) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

STATEMENT OF THE CASE

Petitioner, John William Hammond, was convicted of conducting a gambling business involving five or persons in violation of Title 18 United States Code Section 1955 and also aiding and abetting the use of interstate facilities for transmitting wagering information in violation of Title 18 United States Code Section 1084. Petitioner seeks review by this Court of his conviction under Title 18 United States Code Section 1955 only.

Petitioner was charged with three other individuals of conducting a gambling business involving five or more persons in violation of Section 1955. Petitioner conceded at trial and on appeal that the government was able to prove all but one element of the offense.

Petitioner asserts that the evidence was insufficient to sustain his

conviction of conducting a gambling business involving five or more persons where the government's primary target for the fifth participant who "conducted" part of the gambling business was a woman, Sandra Crawford, who permitted another individual to use the telephone at her residence for purposes of taking telephone calls from bettors. See 8th Circuit Slip op. at page A-5 herein.

At trial, Ms. Crawford testified that she knew, without petitioner telling her, that her phone was used in connection with petitioner's gambling business. Crawford was told that the man using her phone would not be taking actual bets. Crawford was paid $50.00 every two weeks or every month for the use of her telephone. Petitioner gave Crawford rice paper which she in turn gave to the man using her home when he

used the phone. On a few occassions, Ms. Crawford took calls before the man arrived at her residence and she recorded the information and turned it over to the bet taker.

At the conclusion of the trial, the jury was instructed, in accordance with E. Devitt & C. Blackmar, Federal Jury Practice, that, "the term 'conduct' as it is used in connection with the gambling business means to perform any act, function or duty which is necessary to or helpful in the ordinary operation of the business. A person may be found to conduct a gambling business, even though he is a mere servant or employee, having no part in the management or control of the business and no share in the profits. A mere bettor or customer in a gambling business cannot properly be said to conduct the business." Federal Jury Practice Instructions, Section 61.05.

Petitioner objected to the jury instruction which permitted the interpretation that any act which is merely helpful to a gambling operation could render an individual one of the five participants necessary to constitute an illegal gambling business under Title 18 United States Code Section 1955.

REASONS FOR GRANTING WRIT

Certiorari should be granted and an interpretation of the word "conduct" as used in Title 18 United States Code Section 1955 should be settled by this Court for two reasons: first, there is a conflict in the circuits regarding the interpretation of the term; and second, the interpretation permitted by the Eighth Circuit in this case, and also permitted by other jurisdictions, denies an accused due process and fundamental

fairness by not adequately giving the accused fair notice of the conduct which is prohibited under the federal gambling statute.

In the federal jury instructions by E. Devitt and C. Blackmar, the term "conduct" has been interpreted to include not only acts necessary to a gambling operation but also acts which are merely helpful to the operation. The Devitt and Blackmar instructions have been approved by various circuit courts (see e.g. cases cited in footnote 4 of the Circuit Court's opinion, A-15 herein) and thus interpretation of the statute has evolved to include as a conductor or manager in a gambling operation any person who performs an act, however helpful to the operation. Such an interpretation is contrary to a reasonable interpretation of the word "conduct" and in fact does violence to

the ordinary understanding of the word in the English language.

In this case, the Eighth Circuit Court of Appeals relied on its previous decision, United States v. Bennett, 563 F.2d 879 (8th Cir.) cert. denied, 434 U.S. 924 (1977) in rejecting petitioner's claim that the trial court's interpretation of "conduct" was overly-broad and denied petitioner due process when the court's interpretation allowed criminal sanctions to be imposed upon him without fair warning that his acts were illegal. See United States v. Larson, 796 F.2d 244 (8th Cir. 1986).

In Bennett, 563 F.2d 879 (8th Cir.), the Circuit Court found that anyone who participates in the gambling operation other than a customer or a bettor falls within the purview of Section 1955. 563 F.2d at 881. The Bennett interpretation of the word

[illegible]

"conduct" which was followed in this case is inadequate and shortsighted in its inclusion of any and all persons remotely connected to a gambling operation other than a customer or bettor.

Indeed, Senior Circuit Judge Myron H. Bright, in a separate concurring opinion, rejected the panel's implicit position that anyone other than a customer or a bettor who performs any act, regardless of how indirect or passive, can qualify as a participant for purposes of Section 1955.

Judge Bright cited two Tenth Circuit cases in support of his position that passive or indirect participants should not be included with those deemed to "conduct" an illegal gambling business. At trial and upon appeal, petitioner urged the courts to follow the most recent interpretation of the

word conduct promoted by the Tenth Circuit.

In United States v. Boss, 671 F.2d 396 (10th Cir. 1982) and United States v. Morris, 612 F.2d 483 (10th Cir. 1979) the Tenth Circuit has concluded that participants in an illegal gambling operation may include lower and higher echelons of participants, but the function performed by the participant must be "necessary" to the illegal gambling business. In Boss the 10th Circuit overturned the convictions of three waitresses who served drinks to patrons in the back room of a hall where a gambling operation existed. The Boss Court found no proof that the waitresses "performed functions necessary to the illegal gambling business, and their relationship to it was too attenuated to be counted . . . as persons who 'conduct, finance, manage, supervise,

direct or own' the gambling business." 671 F.2d at 402. Using the same analysis, the Boss Court also found that the owner of the building, the bartenders, band members and a woman at the door of the dancehall could not be used to satisfy the fifth person requirement for an illegal gambling operation under Section 1955. Id.

Similarly, in United States v. Morris, 612 F.2d 483 (10th Cir. 1979), the Tenth Circuit Court reversed the conviction of a woman, Jarvis, whose apartment appellant Morris used and who received calls for Morris informing the the caller where Morris could be reached. The Morris Court found that Jarvis was not among the high level bosses or street level employees. The Morris Court stated that Jarvis could have been convicted as an aider or abettor but not counted as a participant under Section 1955. 612 F.2d at 494.

Petitioner concedes that Crawford's actions could have rendered her an aider and abettor but that her actions fall fatally short of the degree of participation necessary to qualify her as one who "conducts, manages, finances or owns."

Lastly, the interpretation of the word "conduct" by the Eighth Circuit is overly broad and violates the principle that criminal statutes must be interpretated in favor of lenity and in favor of the accused. See United States v. Emmons, 410 U.S. 396 (1973). An accused must be given fair notice of conduct which is deemed illegal. The Eighth Circuit's holding in this case directly conflicts with its own holding in United States v. Larson, 796 F.2d 244 (8th Cir. 1986) as well as general principles of due process and fundamental fairness protected by the fourteenth amendment.

CONCLUSION

Based on the foregoing, petitioner urges this Court to grant his petition for writ of certiorari, first to settle the conflicts in the circuits regarding the correct interpretation to be afford the word "conduct" under Title 18 United States Code Section 1955 and to ascertain whether the prevailing interpretation of conduct violates principles of due process and fundamental fairness.

Respectfully submitted,
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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 86-5419

United States of America, Appellee,	*	
v.	*	Appeal from the United States
John William Hammond, a/k/a "Big John", Appellant.	*	District Court for the District of Minnesota.

Submitted: May 12, 1987

Filed: June 16, 1987

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before LAY, Chief Judge, BRIGHT, Senior Circuit Judge, and WOLLMAN, Circuit Judge.

LAY, Chief Judge.

John William Hammond was convicted of one count of conducting a gambling business involving five or more persons in violation of 18 U.S.C. § 1955 (1982) and of four counts of aiding and abetting in the use of interstate facilities for transmitting wagering information under 18 U.S.C. § 1084 (1982). Hammond was sentenced by the district court[1] to three years imprisonment for violation of § 1955 for two years on each of the aiding and abetting counts, all sentences to be served concurrently. He was also fined a total of $30,000. Hammond now appeals challenging the sufficiency of the evidence as to each count. We affirm his convictions.

Background

Between August, 1983, and January, 1984, Hammond ran an illegal bookmaking operation in St. Paul, Minnesota. In an

attempt to avoid detection, Hammond hired at least three individuals to communicate with bettors over the telephone. One such employee was James Rebeck, whose job it was to receive telephone calls from bettors wishing to place wagers. Rebeck would record the names of the bettors, usually code names, and possibly their telephone numbers or location, on rice paper; he never actually recorded bets. The reason Rebeck used rice paper is that it can be quickly and easily destroyed by immersion in water. Periodically, Rebeck would receive telephone calls from either Hammond or one of two other employees, Steven Chiarella or William Klabunder, and give the caller the information provided by the bettors.

Chiarella and Klabunder each had lists, supplied by Hammond, of the code names used by Hammond's clients and the

telephone numbers where they could be reached. Chiarella and Klabunder would record the names given to Rebeck, then call the bettors and record the respective wagers, also using water-soluble rice paper. Occasionally, they made long-distance telephone calls to take wagers. Every fifteen minutes or so an unknown caller, but in all probability Hammond himself, would call Chiarella and Klabunder and ask them to communicate the bets they had taken. Once communicated, Chiarella and Klabunder destroyed the tally sheets.

The main issue in this case was whether a fifth person, in addition to Hammond, Rebeck, Chiarella, and Klabunder, participated in Hammond's gambling operation to such an extent that he or she would be a person who "conducts" part of an illegal gambling business within the contemplation of 18

U.S.C. § 1955. The primary target of the the government's case was Sandra Crawford, Hammond's friend for the previous ten years. In August, 1983, Crawford agreed to allow Rebeck to use the telephone at her residence for the purpose of taking incoming telephone calls from bettors. Although Hammond did not tell Crawford the reason he needed the use of her phone, she testified that "[h]e didn't have to." She knew that it was in connection with the gambling business. Crawford was paid fifty dollars every two weeks or every month for the use of her telephone.

Hammond supplied Crawford with a quantity of rice paper which Crawford made available for Rebeck's use. Crawford was often present when Rebeck took calls from bettors and observed him making notes. She occasionally answered the telephone herself and recorded the

information given her, later relaying it to persons calling and requesting the names. Crawford also occasionally forwarded the call to Rebeck's residence when he could not make it to her house or when she did not wish to be disturbed.[2]

Discussion

Hammond contends that this court should adopt the interpretation of the word "conducts," as used in 18 U.S.C. § 1955,[3] that has been adopted by the Tenth Circuit. In United States v. Boss, 671 F.2d 396 (10th Cir. 1982), the Tenth Circuit held that waitresses who served drinks to dance hall customers, who were gambling in an illegal dice room at the hall, did not fall within the purview of section 1955's prohibition against one who "conducts" a gambling operation. Id. at 402. The

court held that section 1955 contemplates that participants in an illegal gambling operation must perform duties "necessary" to the operation of the gambling business. Id. at 400. The waitresses, who did nothing more than serve drinks to the gamblers, were not "necessary" to the business within the meaning of the act. See also United States v. Morris, 612 F.2d 483 (10th Cir. 1979) (person who allowed principals in a bookmaking operation to use her apartment and who received telephone messages for the principals was not a conductor of the business since her actions were merely helpful to the operation of the enterprise).

The Tenth Circuit's approach has not been adopted in the clear majority of the circuits.[4] In United States v. Bennett, 563 F.2d 879 (8th Cir.), cert. denied, 434 U.S. 924 (1977), in approval

of the majority position, this court stated that section 1955 includes anyone who participates in a gambling business other than a customer or bettor. Id. at 881. The scope of section 1955 is quite broad, all levels of personnel involved in the operation of a gambling business, not just those on the management level, are to be considered in determining whether five or more persons conduct such business within the meaining of section 1955. United States v. Meese, 479 F.2d 42, 43 (8th Cir. 1973); see also United States v. Reeder, 614 F.2d 1179, 1182 (8th Cir. 1980). Accordingly, we hold that the trial court's denial of Hammond's requested jury instructions incorporating the Tenth Circuit's view of section 1955 was proper.[5]

Hammond further argues that he was convicted on insufficient evidence

because even under the view of section 1955 as expressed in Bennet, Crawford and the other individuals involved were, at most, passive or inactive participants who may have been convicted for aiding and abetting Hammond, but not as participants. The evidence does not support this argument. Crawford clearly had more than a passive role. Not only did she knowingly permit her telephone to be used in the operation of Hammond's gambling enterprise, she was paid for that service. Crawford also supplied Rebeck with the water-soluble rice paper used to record bettors and, on occasion, actually recorded bettor's names herself. The fact that she was compensated for her inconvenience helps bring her within the purview of section 1955.

Hammond also argues that the evidence was insufficient to prove he

knowingly aided and abetted in the use of interstate facilities for the transmission of wagering information. Title 18 U.S.C. § 1084 prohibits persons engaged in the business of wagering or betting from knowingly using a wire communication facility for the transmission in interstate commerce of wagers or information relating to wagers. One of Hammond's customers, Henry Olson, owned a second home in Arizona, from which Olson placed several bets during the relevant time period. Both Chiarella and Klabunder admitted calling Olson in Arizona on at least four occasions to take bets. Hammond contends that he did not know that Olson had moved to Arizona during this period of time. Olson testified that when he left for Arizona, he left word with someone other than Hammond and told that person the number where he could be reached.

In reviewing challenges to jury verdicts convicting a person of criminal acts, we must view the evidence in the light most favorable to the government and draw all reasonable inferences tending to support the verdict. United States v. Pintar, 630 F.2d 1270, 1276 (8th Cir. 1980). The evidence presented here does tend to show that Hammond knew Chiarella and Klabunder were placing long-distance calls to take bets. Both men testified that Hammond supplied them with the bettors' code names and the telephone numbers where they could be reached. They both stated that when Rebeck informed them that Olson had called, they telephoned Olson in Arizona using the number supplied on the list. Given this evidence, it was reasonable for the jury to infer that Hammond knew that out of state calls were being made for the purpose of conveying wagering information.

The judgment of the district court is affirmed.

BRIGHT, Senior Circuit Judge, concurring in the result.

While I concur in the result, I write separately to state my view that persons who do not directly participate in gambling operations should not be counted as persons "involved" in the "conduct" of such business within the purview of 18 U.S.C. § 1955(b).

Thus, neither cocktail waitresses nor passive lessors of the betting place who do not partake in the gaming process should not be counted in the determination of whether or not a defendant "conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business," 18 U.S.C. § 1955(a), as has been determined by the Tenth Circuit in United States v.

Boss, 671 F.2d 396 (1982) and United States v. Morris, 612 F.2d 483 (1979).

We need not disapprove of the results reached in the Tenth Circuit's decisions in order to affirm here. Crawford on occasion participated directly in the gambling operation and the evidence entitled the jury to conclude that Hammond's gambling activity included at least five persons.

A true copy.

ATTEST:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

[1]The Honorable Donald D. Alsop, United States District Court for the District of Minnesota, presiding.

[2]The government contends that other individuals also helped conduct Hammond's gambling business by allowing Chiarella and Klabunder to use their telephones in their bookmaking operation. Since none of these individuals were any more involved in the business than was Crawford, further discussion of their roles in the operation is unnecessary.

[3]Title 18 U.S.C. 1955 provides in pertinent part as follows:

> (a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined not more than $20,000 or imprisoned not more than five years, or both.
>
> (b) As used in this section--
> (1) "illegal gambling business" means a gambling business which--
> (i) is a violation of the law of a State or political subdivision in which it is conducted;
> (ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and
> (iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in a single day.

(2) "gambling" includes but is not limited to pool-selling, bookmaking, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy, bolita or numbers games, or selling chances therein.
(3) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

[4]See Sanabria v. United States, 437 U.S. 54, 70-71 n.26 (1978), in which the United States Supreme Court noted:

> [N]umerous cases have recognized that 18 U.S.C. § 1955 (1976 ed.) proscribes any degree of participation in an illegal gambling business, except participation as a mere bettor. See, e.g., United States v. Di Muro, 540 F.2d 503, 507-08 (1st Cir. 1976), cert. denied, 429 U.S. 1038 (1977); United States v. Leon, 534 F.2d 667, 676 (6th Cir. 1976); United States v. Brick, 502 F.2d 219, 225 n.17 (8th Cir. 1974); United States v. Smaldone, 485 F.2d 1333, 1351 (11th Cir. 1973), cert. denied, 416 U.S. 936 (1974); United States v. Hunter, 478 F.2d 1019, 1021-22 (7th Cir.), cert. denied, 414 U.S. 857 (1973); United States v. Ceraso, 467 F.2d 653, 656 (3rd Cir. 1972); United States v. Becker, 461 F.2d 230, 232-33 (2nd Cir. 1972), vacated on other grounds, 417 U.S. 903 (1974).

[5]The trial court instructed the jury:

> The term "conduct" as it is used in connection with the gambling business means to perform any act, function or duty which is necessary to or helpful in the ordinary operation of the business. A person may be found to conduct a gambling business even though he is a mere servant or employee having no part in the management or control of the business and no share in the profits.
>
> A mere bettor or customer of a gambling business cannot properly be said to conduct the business.

See E. Devitt & C. Blackmar, Federal Jury Practice and Instructions § 61.05 (1977).

[6]Hammond also argues that the only reasonable interpretation of 18 U.S.C. § 1955 is that the five or more persons involved in the gambling business must be necessary to the operation of that business, and to convict him under the statute where one of the five was not necessary to the operation of the business deprives him of his constitutional rights to due process of law. In other words, Hammond contends, he did not have fair warning that his conduct would violate section 1955. We find this argument to be without merit. The due process clause merely requires that people should not be branded as criminals without fair notice that the

legislature has forbidden certain conduct. Knutson v. Brewer, 619 F.2d 747, 749 (8th Cir. 1980). This does not mean, however, that a defendant will receive the benefit of the narrowest possible construction of criminal statue. Id. at 751. "All the Due Process Clause requires is that the law give sufficient warning that men may conduct themselves so as to avoid that which is forbidden." Rose v. Locke, 423 U.S. 48, 50 (1975) (per curiam). Section 1955 gave Hammond sufficient notice under this standard.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 86-5419-MN

United States of America, Appellee, vs. John William Hammond, a/k/a "Big John", Appellant.	* * * * * * * * * * *	Appeal from the United States District Court for the District of Minnesota.

Appellant's petition for rehearing en banc has been considered by the Court and is denied.

Petition for rehearing by the panel is also denied.

July 27, 1987

Order Entered at the Direction of the Court:

Robert D. St. Vrain

Clerk, United States Court of Appeals, Eighth Circuit

No. 87-659

In the Supreme Court of the United States

OCTOBER TERM, 1987

JOHN WILLIAM HAMMOND, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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TABLE OF AUTHORITIES

In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-659

JOHN WILLIAM HAMMOND, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that an individual cannot be counted as being among the five persons who "conduct" an illegal gambling business under 18 U.S.C. 1955 unless that person was "necessary" to the operation of the business.

1. After a jury trial in the United States District Court for the District of Minnesota, petitioner was convicted on one count of conducting an illegal gambling business, in violation of 18 U.S.C. 1955, and on four counts of using interstate facilities to transmit wagering information, in violation of 18 U.S.C. 1084. He was sentenced to three years' imprisonment and a $30,000 fine. The court of appeals affirmed (Pet. App. A1-A17).

The evidence at trial showed that between August 1983 and January 1984, petitioner ran a baseball and football bookmaking operation in St. Paul, Minnesota. He used three other men—co-defendants James Rebeck, Steven Chiarella, and William Klabunder—to take bets over the telephone. The three men then relayed their information to petitioner. On occasion, petitioner's friend, unindicted

co-conspirator Sandra Crawford, also took messages from petitioner's customers. Pet. App. A2-A6.

Petitioner attempted to isolate himself from direct contact with bettors by using intermediaries. He placed Rebeck at a message center to take the names, and sometimes the telephone numbers, of bettors. The customer's names generally were in code. Rebeck would convey the coded names to petitioner, Chiarella, or Klabunder, who periodically would telephone Rebeck for that information. Petitioner would provide Chiarella and Klabunder with a directory of the codes and telephone numbers for the customers. Chiarella and Klabunder, like Rebeck, would record that information on rice paper, which was soluble in water. Chiarella and Klabunder, operating out of different locations, would then call the bettors and take their betting information, which they also would record on the rice paper. An unidentified man, who the evidence suggested was probably petitioner, would call Chiarella and Klabunder at 15-minute intervals and obtain the betting information from them. After Chiarella and Klabunder conveyed the messages to petitioner, they would destroy their tally sheets. Pet. App. A2-A4.

In the course of his bookmaking business, petitioner had Rebeck use Crawford's telephone as the message center for petitioner's customers. In August 1983 Crawford agreed to allow Rebeck to use her phone for that purpose. Although petitioner did not say that Rebeck would be taking bets, Crawford knew that her phone would be used in connection with the gambling business. Petitioner paid Crawford approximately $50 every two weeks or monthly for the use of her phone. He also gave Crawford a supply of rice paper, which Crawford gave to Rebeck. Crawford was present when many of the calls were received, and at times Crawford herself took messages from bettors and passed the messages on to other members of the business. At other times when Rebeck was

not at her house, Crawford directed potential bettors to call Rebeck at his residence. Pet. App. A5-A6.[1]

At trial and on appeal, petitioner did not dispute the evidence that he operated a bookmaking business. Instead, he argued that the evidence failed to satisfy the requirement in Section 1955 that five persons be involved in "conducting" the business, because Crawford merely assisted the business but was not necessary to its operation.[2] Both courts below rejected that claim.

The panel majority held that anyone who participates in a gambling business other than as a bettor or customer "conducts" the business within the meaning of Section 1955. The court noted but rejected the contrary ruling of the Tenth Circuit in *United States* v. *Boss*, 671 F.2d 396, 400-402 (1982), that an individual does not fall within the term "conduct" in Section 1955 unless that person performs a duty "necessary" to the operation of the illegal gambling business. The majority also noted that no other court of appeals had adopted the Tenth Circuit's definition of the term "conduct." Pet. App. A6-A8.

Judge Bright concurred in the result. In his view, "persons who do not directly participate in gambling operations should not be counted as persons 'involved' in the 'conduct' of such business within the purview of 18 U.S.C. § 1955(b)" (Pet. App. A12). Under Judge Bright's construction of the statute, persons such as cocktail waitresses or lessors of a location used for gambling should not be counted as persons who "conduct" a gambling business for purposes of Section 1955 (Pet. App. A12). Judge Bright

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[1] In addition, Chiarella and Klabunder paid three other persons to allow Chiarella and Klabunder to use their telephones to take bets (Tr. 161, 206-207, 245-251, 254-258, 267).

[2] Section 1955(b)(1)(ii) defines an illegal gambling business, in pertinent part, as one that "involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business."

concurred in the result, however, because he concluded that even under his construction of the statute, Crawford "conduct[ed]" the gambling business, because she at times directly participated in the gambling operation (*id.* at A13).

2. Petitioner renews his claim (Pet. 7-13) that the court of appeals improperly construed the term "conduct" in 18 U.S.C. 1955(b), and he contends that the decision of the court of appeals in this case conflicts with the decision of the Tenth Circuit in *United States* v. *Boss, supra.*

The Tenth Circuit in *Boss* confined the scope of the term "conduct" to persons who are "necessary" to the gambling business. As the court of appeals noted in this case, no other court has adopted the Tenth Circuit's interpretation of the statute. In the *Boss* case, the Tenth Circuit held that a cocktail waitress did not fall within the class of persons conducting a gambling business because she merely assisted the business rather than performing a function necessary to its operation. 671 F.2d at 402. All other courts facing the issue have held that anyone who participates in a gambling business, other than a bettor or customer, can be included as one of those who "conducts" the business. See, *e.g., United States* v. *Merrell,* 701 F.2d 53, 55 (6th Cir.), cert. denied, 463 U.S. 1230 (1983); *United States* v. *Colacurcio,* 659 F.2d 684, 688 (5th Cir. 1981), cert. denied, 455 U.S. 1002 (1982); *United States* v. *Greco,* 619 F.2d 635, 638 (7th Cir. 1980); *United States* v. *Bennett,* 563 F.2d 879, 881 (8th Cir.), cert. denied, 434 U.S. 924 (1977); *United States* v. *Calaway,* 524 F.2d 609, 617 (9th Cir. 1975), cert. denied, 424 U.S. 967 (1976); see also *Sanabria* v. *United States,* 437 U.S. 54, 70-71 n.26 (1978) (collecting cases). Whatever the proper resolution of that conflict, however, this case does not present it. As Judge Bright pointed out in his concurring opinion, Crawford's conduct brought her within even the Tenth Circuit's construction of Section 1955, because she actively

participated in the scheme at times. Pet. App. A12-A13. Besides allowing her telephone to be used to promote the gambling business and receiving compensation for that service, Crawford supplied Rebeck with rice paper, and on occasion she took bettors' names for the operation. See *id.* at A9. By performing those services, Crawford plainly was engaging in a function necessary to the scheme. Since it appears that even the Tenth Circuit would find Crawford to be one of the persons conducting the illegal business, this case is not an appropriate vehicle for resolving the asserted conflict among the circuits on this issue.[3]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

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[3] Petitioner also briefly asserts (Pet. 13) that he was denied due process because the statute failed to give him fair notice that his conduct was criminal. Because petitioner's conduct was within the reach of the statute under any court's standard, this argument is wholly without merit. Even if petitioner's conduct would not have violated Section 1955 under the Tenth Circuit's interpretation of the statute, petitioner still would not have a plausible due process claim; the court of appeals' construction of the statute was one that petitioner could easily have anticipated, particularly since the same court had long since interpreted the statute in precisely the same fashion as the panel majority in this case. See *United States* v. *Bennett*, 563 F.2d 879 (8th Cir.), cert. denied, 434 U.S. 924 (1977).

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